

Date of Decision: 19th July 1995

SPECIAL CIVIL APPLICATION NO. 3795 of 1988

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not?
Yes
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Shri R.N. Shah, Advocate, for the Petitioner

Shri V.B. Gharaniya, Asst. Government Pleader, for Respondent No. 1

Respondent No.2 served

CORAM: A.N. DIVECHA, J.
(19th July 1995)

ORAL JUDGMENT

The judgment and the order passed by the learned Additional Sessions Judge of Bharuch at Rajpipla Camp on 22nd April 1988 in Criminal Revision application No. 96 of 1987

are under challenge in this petition under Art. 227 of the Constitution of India. By his impugned judgment and order, the learned Additional Sessions Judge set aside the judgment and the order passed by the learned Judicial Magistrate (First Class) at Rajpipla on 19th September 1987 in Municipal Appeal No. 3 of 1987. By his aforesaid judgment and order, the learned Magistrate had accepted the petitioner's appeal against the levy of penalty on the amount of octroi payable by the petitioner on the goods imported by him within the municipal limits of Respondent No.2 Municipality.

2. The facts giving rise to this petition move in a narrow compass. The petitioner has been carrying on his business in grains and provisions. It appears that he received goods from Jagdish Oil Industries of Ahmedabad on 7th July 1987 in one tempo bearing RTO Regn. No. GRS 3252. It appears that the driver of the vehicle did not pay octroi on the goods in question while bringing the goods within the municipal limits of respondent No.2 Municipality. On realizing this fact, the petitioner went to pay the amount of octroi payable on the said goods. It was not accepted on the ground that the proceedings for non-payment of octroi were in contemplation. Later on a notice of 9th July 1987 bearing No. 1260 was served to the petitioner claiming the amount of octroi together with 10 times the penalty in all in the sum of Rs. 17,587/-. The petitioner paid that amount on 10th July 1987 under protest. He thereafter preferred an appeal against such claim under sec. 138 of the Gujarat Municipalities Act, 1963 ('the Municipalities Act' for brief). It came to be registered as Municipal Appeal No. 3 of 1987. After hearing the parties, by his judgment and order passed on 19th September 1987 in the aforesaid appeal, the learned Judicial Magistrate (First Class) at Rajpipla accepted the appeal and ordered refund of the balance amount to the petitioner after deducting from the amount paid by the petitioner pursuant to the aforesaid notice the amount of octroi and the expenses for recovery thereof. Its copy is at Annexure B to this petition. Respondent No. 2 was aggrieved by the judgment and the order at Annexure B to this petition. It therefore carried the matter in revision before the Sessions Court at Bharuch. It came to be registered as Criminal Revision Application No. 96 of 1987. It appears to have been assigned to the Additional Sessions Judge of Bharuch on his camp at Rajpipla. By his judgment and order passed on 22nd April 1988 in the aforesaid revisional application, the learned Additional Sessions Judge accepted it and set aside the judgment and the order at Annexure B to this petition. A copy of the judgment and the order passed by the learned Additional Sessions Judge as aforesaid is at Annexure C to this petition. The aggrieved petitioner thereupon invoked the extra-ordinary jurisdiction of this court under Art. 227

of the Constitution of India by means of his Special Criminal Application No. 462 of 1988. By the order passed by this court on 14th July 1988 therein, it was permitted to be converted into a special civil application and it has been registered as such. The petitioner has questioned the correctness of the judgment and the order at Annexure C to this petition in this case.

3. It may be mentioned at this stage that the learned Additional Sessions Judge accepted the revisional application mainly on the ground that the dispute involved in appeal under sec. 138 of the Municipalities Act partook the character of a civil dispute and the learned Magistrate had no jurisdiction to grant the declaration that respondent No.2 Municipality had no authority to levy penalty on the octroi amount. According to the learned Additional Sessions Judge, such a relief of declaration could have been granted by the competent civil court in an appropriate civil proceeding.

4. It may be mentioned at this stage that the learned Magistrate in his judgment and order at Annexure B to this petition has correctly examined the position of law in the light of sec.125 of the Municipalities Act. It reads:

Where any animal or goods passing into a municipal

borough are liable to the payment of octroi, any person who, with the intention of defrauding the municipality, causes or abets the introduction of or himself introduces or attempts to introduce within the octroi limits of the said borough any such animal or goods upon which payment of the octroi due on such introduction has neither been made nor tendered, or who fails to comply with any direction given by the officer referred to in section 124 with reference to the introduction of any animal or goods within the octroi limits, shall be punishable with fine which may extend to ten times the amount of such octroi or to fifty rupees, whichever may be greater.

It becomes clear from its bare perusal and reading that the power to impose penalty is on conviction of the person charged with evasion of octroi. Such power can be exercised by the court convicting the person guilty of evasion of octroi amount in an appropriate proceeding taken out for the purpose. The aforesaid statutory provision could not have been resorted to by respondent No.2 Municipality or by any of its officer for levying penalty on the octroi amount payable by the petitioner. No other provision in the Municipalities Act is brought to my notice empowering respondent No.2 Municipality or any of its officers to levy any penalty on the amount of octroi payable by the petitioner on the ground of its evasion. In absence of any such provision, respondent

No.2 Municipality or its officer could not have claimed any penalty amount from the petitioner with respect to the goods imported by him or on his behalf on 7th July 1987 in the aforesaid tempo vehicle within the municipal limits of respondent No.2 Municipality.

5. I am fortified in my view by the unreported ruling of this court in Special Civil Application No. 3287 of 1982 decided on 2nd December 1982 (per R.C. Mankad, J. as he then was). In that case, a businessman in Ahmedabad was charged with evasion of octroi on the goods imported within the municipal limits of Ahmedabad and he was required to pay the octroi amount due on such goods with penalty five times the octroi amount. Such levy of penalty was challenged by the concerned businessman by means of the aforesaid writ petition. Section 392 of the Bombay Provincial Municipal Corporations Act, 1949 ('the BPMC Act' for brief) was pressed into service for the purpose of justifying the levy of penalty on the octroi amount. On interpretation of the aforesaid statutory provision, this court came to the conclusion that sec. 392 of the BPMC Act would not authorise or empower the Municipal Corporation of Ahmedabad or any of its officers to levy any penalty amount on the octroi payable by the concerned businessman on the ground of its evasion.

6. The aforesaid unreported ruling of this court is on all fours applicable in the present case by analogy. Section 125 of the Municipalities Act is in pari materia with Sec. 398 of the BPMC Act. In that view of the matter, the aforesaid unreported ruling of this court will squarely apply in the instant case. Sitting as a single Judge I am bound by the aforesaid unreported ruling of this court in interpreting a statutory provision. Even otherwise I am in respectful agreement therewith.

7. In order to appreciate the ground on which the revisional application was accepted by the learned Additional Sessions Judge, it would be quite proper to look at the relevant provisions contained in Sec. 138 of the Municipalities Act. It reads:

Section 138. (1) Appeals against any claim included in a bill presented under sub-section (1) of section 132 may be made to any Judicial Magistrate or Bench of such Magistrates by whom under the direction of the Session Judge such class of cases is to be tried.

(2) No such appeal shall be entertained unless--

(a) the appeal is brought within fifteen days next after the presentation of the bill complained of; and

(b) in the case of a tax on buildings or land or both an application in writing stating the grounds on which the claim of the municipality is disputed, has been made to the executive committee within the time fixed in the notice given under section 108 or 109 of the assessment or alteration thereof, according to which the bill is prepared, and

(c) the amount claimed from the applicant has been deposited by him in the municipal office.

(3) The decision of the Magistrate or Bench of Magistrate in any appeal made under sub-section (1) shall, at the instance of either party, be subject to revision by the Court to which appeals against the decision of such Magistrate or Bench ordinarily lie.

It appears that the term 'notice' was loosely used by the petitioner in his appeal under sec. 138 of the Municipalities Act. What was claimed by way of octroi together with the penalty amount from the petitioner was by means of a bill issued under sec. 124 of the Municipalities Act. Any dispute pertaining to such bill would certainly be within the purview of sec. 138 of the Municipalities Act. It may be mentioned that the subject-matter thereof is "any claim included in an appeal". Under Sec. 124 of the Act, a bill would include a claim of octroi.

8. A claim made in the bill can be disputed on several counts and grounds. Such grounds could be excess billing, application of wrong principle for assessment, error in computation of claim, and the like. A challenge to the bill may also be on the basis of levy of amount by way of claim not authorised or empowered by law. While entertaining and deciding such appeal under sec. 138 of the Municipalities Act, the Magistrate empowered to do so will have to decide the dispute in that regard. In the process, on being satisfied about unauthorised levy of a claim or a part thereof, the Magistrate empowered in that behalf might have come to the conclusion that the levy or any part thereof was unauthorised. It would be in the nature of a declaration. When the remedy under sec. 138 of the Municipalities Act has been provided for a taxpayer, it would not be necessary for him to approach the civil court for the purpose of obtaining a declaration inter alia about the unauthorised levy of any amount by way of tax. It cannot be gainsaid that the word 'tax' defined in sec. 2(26) of the Municipalities Act would include the levy of octroi also.

9. In the instant case, the grievance of the petitioner before the forum under sec. 138 of the Municipalities Act was to the effect that respondent No.2 Municipality was

neither authorised nor empowered to levy any penalty on the amount of octroi payable by the petitioner for the goods imported on 7th July 1987 on the ground of its evasion. Even at the cost of repetition, it may be reiterated that the claim was made by respondent No. 2 Municipality against the petitioner for payment of such octroi with penalty. In that view of the matter, the petitioner was justified in moving the forum under sec. 138 of the Municipalities Act. The learned Magistrate empowered to decide such appeal was required to come to the conclusion whether or not respondent No.2 Municipality was justified in levying the amount of penalty on the amount of octroi payable by the petitioner on the goods imported by him on 7th July 1987 on the ground of its evasion. As aforesaid, the learned Magistrate rightly found in favour of the petitioner and came to the conclusion that respondent No.2 Municipality had no such authority or power to claim any penalty amount on the amount of octroi payable by the petitioner as aforesaid. Such conclusion, even if it is in a declaratory form, was within the jurisdiction of the learned Magistrate deciding the dispute under sec. 138 of the Municipalities Act. The learned Additional Sessions Judge was therefore in error in holding that such a declaration was within the competence of the civil court and not within the competence of the learned Magistrate empowered to decide appeals under sec. 138 of the Municipalities Act.

10. In view of my aforesaid discussion, I am of the opinion that the judgment and the order at Annexure C to this petition cannot be sustained in law. They have to be quashed and set aside. As aforesaid, the judgment and the order at Annexure B to this petition passed by the learned Magistrate is in consonance with the correct position of law in that regard. The same deserve to be restored.

11. In the result, this petition is accepted. The judgment and the order passed by the learned Additional Sessions Judge of Bharuch on 22nd April 1988 in Criminal Revision Application No. 96 of 1987 at Annexure C to this petition are quashed and set aside. The judgment and the order passed by the learned Judicial Magistrate (First Class) at Rajpipla on 19th September 1987 in Municipal Appeal No. 3 of 1987 is restored. Respondent No.2 Municipality is directed to act in accordance with the judgment and the order of the learned Magistrate at Annexure B to this petition as expeditiously as possible but latest within six weeks from the date of receipt of the writ in this case. It would be open to the petitioner to produce a certified copy of this judgment before respondent No.2 or its appropriate responsible officer for expediting the refund claim. In that case, the time-limit of six weeks would start from the date of production of such

certified copy. Rule is accordingly made absolute with no order as to costs.

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